

Real Property, Financial Services, & Title Insurance Update: Week Ending April 17, 2020

April 17, 2020

Real Property Update

- **Foreclosure / Redemption / Intervention:** Claim for right of redemption procedurally barred once certificate of title issued; party failed to appeal earlier order denying right to intervene in foreclosure action and an order denying intervention is a final, appealable order, meaning party failing to appeal denial of its motion to intervene cannot properly raise the claimed intervention rights on appeal from a subsequent merits judgment in the cause - [Pensacola Beach, LLC v. Am. Fidelity Life Ins. Co.](#), Nos. 1D17-2741, 1D17-2914, 1D17-4751, 1D17-4132, 1D18-0907 (Fla. 1st DCA Apr. 15, 2020) (affirming dismissal of declaratory judgment claim)
- **Foreclosure / Redemption:** Arguments for right to redemption are waived when party fails to assert them in foreclosure appeal in which it was a party; foreclosure appeal was final opportunity to raise issues affecting party's rights upon foreclosure - [Pensacola Beach, LLC v. Am. Fidelity Life Ins. Co.](#), Nos. 1D17-2741, 1D17-2914, 1D17-4751, 1D17-4132, 1D18-0907 (Fla. 1st DCA Apr. 15, 2020) (affirming dismissal of declaratory judgment claim)
- **Foreclosure / Sublease v. Assignment / Scope of Mortgage:** Language of sublease was an assignment in legal effect as terms of mortgage encompassed interest that sublessor argued it retained; legal effect, not title, of document controls - [Pensacola Beach, LLC v. Am. Fidelity Life Ins. Co.](#), Nos. 1D17-2741, 1D17-2914, 1D17-4751, 1D17-4132, 1D18-0907 (Fla. 1st DCA Apr. 15, 2020) (affirming dismissal of declaratory judgment claim)
- **Foreclosure / Paragraph 22 Notice:** Business record bank used to prove notice of intent to accelerate mortgage debt contained inadmissible hearsay - [Roesch v. U.S. Bank Nat'l Ass'n](#), No. 2D18-1686 (Fla. 2d DCA Apr. 15, 2020) (reversing and remanding for dismissal of foreclosure action)

- **Foreclosure / Paragraph 22 Notice:** Bank's witness from its servicer could not adequately testify as to vendor's mailing practices and was therefore unable to act as record custodian to admit "letter log" indicating the date default letter was sent - [Roesch v. U.S. Bank Nat'l Ass'n](#), No. 2D18-1686 (Fla. 2d DCA Apr. 15, 2020) (reversing and remanding for dismissal of foreclosure action)

Financial Services Update

- **TILA and RESPA:** A trust created by an individual for tax and estate planning purposes does not lose all state and federal consumer disclosure protections when it seeks to finance repairs to a personal residence for the trust beneficiary rather than for the trustee herself, but, instead, such a loan transaction remains a "consumer credit transaction" within the meaning of TILA and RESPA - [Gilliam v. Levine](#), No. 18-56737 (9th Cir. Apr. 14, 2020) (reversing and remanding for further proceedings)
- **TCPA / Sufficiency of Allegations:** Plaintiffs failed to allege a TCPA claim because they did not show that defendants either directly made the call at issue or had an agency relationship with the person who made the call at issue - [Tuck v. McMullen](#), No. 3:19-cv-01505 (S.D. Cal. Apr. 13, 2020) (granting dismissal of TCPA claim)
- **FDCPA / Sufficiency of Allegations:** Defendants did not qualify as "debt collectors" because plaintiffs' complaint alleged that the defendants were officers or employees "of a creditor while, in the name of the creditor, collecting debts for such creditor" - [Tuck v. McMullen](#), No. 3:19-cv-01505 (S.D. Cal. Apr. 13, 2020) (granting dismissal of FDCPA claims)
- **FCRA:** Employer violated FCRA's disclosure requirement prohibiting employer from including any extraneous information when it notified job applicant of its intent to obtain his consumer report; disclosure included a good faith explanation about applicant's right to obtain and inspect information about his credit file, which was language that pulled his attention away from his privacy rights protected by the FCRA, and was required to be provided in a document separate from the disclosure itself - [Walker v. Fred Meyer, Inc.](#), No. 18-35592 (9th Cir. Mar. 20, 2020) (affirmed in part and reversed in part)
- **FCRA:** FCRA does not require Experian to disclose soft credit inquiry information to plaintiff - [Foskaris v. Experian Info. Sols., Inc.](#), No. 18-16480 (9th Cir. Apr. 9, 2020) (affirming dismissal)
- **Consumer Protection Law:** Lack of a transaction, relationship, or other nexus between plaintiffs and defendants forecloses plaintiff's consumer protection claims - [Olson v. Major League Baseball](#), No. 1:20-cv-00632 (S.D.N.Y. Apr. 3, 2020)

Title Insurance Update

- **Title Agents:** It is common for title companies to act as both the local title insurance agent for one or more title insurers and also as an escrow company providing closing and escrow services for a fee, but this does not make the title insurer liable for the title company's mishandling of a closing - [Mazel v. Las Cruces Abstract & Title Co.](#), No. 1:18-ap-01057 (Bankr. D. N.M. Apr. 15, 2020) (opinion granting summary judgment in favor of title insurer on insured's claims for constructive fraud, civil conspiracy, professional negligence, and unfair trade practices)
- **Tort Liability:** Predicting that the New Mexico appellate courts - which have already prevented an insured from suing a title company for a negligent search - would not allow an insured who believes the title agent was negligent in its title work to sue the title insurer in tort; instead, the insured is limited to a claim under the policy - [Mazel v. Las Cruces Abstract & Title Co.](#), No. 1:18-ap-01057 (Bankr. D. N.M. Apr. 15, 2020) (opinion granting summary judgment in favor of title insurer on insured's claims for constructive fraud, civil conspiracy, professional negligence, and unfair trade practices)
- **Tort Liability:** Title company had no actual authority to act as title insurer's agent in providing escrow services to the parties, including obtaining a mortgage release; the commitment, policy, and invoice issued by the title company did not create apparent authority to act on insurer's behalf to provide such services - [Mazel v. Las Cruces Abstract & Title Co.](#), No. 1:18-ap-01057 (Bankr. D. N.M. Apr. 15, 2020) (opinion granting summary judgment in favor of title insurer on insured's claims for constructive fraud, civil conspiracy, professional negligence, and unfair trade practices)

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